FILE COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1959

No. [redacted] 47

ERNEST DOSSY YANCY, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 25, 1958
CERTIORARI GRANTED MARCH 23, 1959

Supreme Court of the United States

OCTOBER TERM, [redacted]

No. [redacted]

ERNEST DOSSY YANCY, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

INDEX

[fol. 3]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

(File Endorsement Omitted)

Information No. 34315

Vio: Sec. 2553(a), Title 26, USC
(Unlawful purchase and sale of narcotics)

UNITED STATES OF AMERICA, PLAINTIFF

v.

ERNEST DOSSY YANCY, DEFENDANT

INFORMATION—Filed May 18, 1954

THE UNITED STATES ATTORNEY CHARGES:

That on or about May 12, 1954, in the Eastern District of Michigan, Southern Division, ERNEST DOSSY YANCY unlawfully and knowingly purchased a quantity of narcotics, to wit: approximately four hundred (400) grains of heroin, not in or from the original stamped package and not having on it the appropriate tax-paid United States Internal Revenue stamps, as required by law; in violation of Section 2553(a), Title 26, USC.

COUNT TWO:

The United States Attorney further charges that on or about May 12, 1954, in the Eastern District of Michigan, Southern Division, ERNEST DOSSY YANCY did unlawfully and knowingly sell, dispense and distribute to a special employee of the U. S. Bureau of Narcotics approximately four hundred (400) grains of heroin, which said heroin was sold, dispensed and distributed not in or from the original stamped package and not having on

it the appropriate tax-paid United States Internal Revenue stamps, as required by law; in violation of Section 2553(a), Title 26, USC.

COUNT THREE:

The United States Attorney further charges that on or about May 17, 1954 in the Eastern District of Michigan, [fol. 4] Southern Division, ERNEST DOSSY YANCY unlawfully and knowingly purchased a quantity of narcotics, to wit: approximately seven hundred seventy-five (775) grains of heroin, not in or from the original stamped package and not having on it the appropriate tax-paid United States Internal Revenue stamps, as required by law; in violation of Section 2553(a), Title 26, USC.

COUNT FOUR:

The United States Attorney further charges that on or about May 17, 1954, in the Eastern District of Michigan, Southern Division, ERNEST DOSSY YANCY did unlawfully and knowingly sell, dispense and distribute to a special employee of the U. S. Bureau of Narcotics approximately seven hundred seventy-five (775) grains of heroin, which said heroin was sold, dispensed and distributed not in or from the original stamped package and not having on it the appropriate tax-paid United States Internal Revenue stamps, as required by law; in violation of Section 2553(a), Title 26, USC.

FRED W. KAESS
United States Attorney

/s/ George E. Woods
GEORGE E. WOODS
Assistant U. S. Attorney

[fol. 5] IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

(Title Omitted)

WAIVER OF INDICTMENT—May 18, 1954

I, ERNEST DOSSY YANCY, the above named defendant, being accused of violating Sec. 2553(a), Title 26, USC (Unlawful sale and purchase of narcotics) and being advised of the nature of the charge and of my riglits, do hereby waive in open court prosecution by indictment and do consent that the proceedings may be by information instead of by indictment.

/s/ Ernest Dossy Yancy
Defendant

/s/ G. Woods
Witness

Dated: May 18, 1954

[fols. 6-19] • • •

[fol. 20] IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

(File Endorsement Omitted)

No. 34315

(Title Omitted)

At a session of said court held in the Federal Building, Detroit, Michigan on August 31, 1954

Present: HONORABLE STEPHEN S. CHANDLER, JR.
United States District Judge

JURY VERDICT—August 31, 1954

The Defendant, ERNEST DOSSY YANCY, being present in Court and the jury heretofore empaneled being again in

Court, and having heard the testimony of witnesses, the proofs and arguments of counsel and charge of the Court, retire from the Bar thereof under charge of the officer duly sworn for that purpose to consider their verdict; and after being absent for a time come into Court again and in the presence of the defendant, say upon their oaths that they find said defendant, ERNEST DOSSY YANCY, guilty as charged in the Information heretofore filed against him as to counts 3 and 4.

The disposition of Counts 1 and 2 is being held in abeyance by the United States Attorney until the time of sentence.

The date of the sentence is set for Thursday, September 2, 1954, at 9:30 a.m. in the forenoon and the matter referred to the Chief Probation Officer of this Court for pre-sentence investigation and report, and the appearance bond of the defendant is continued in full force and effect.

/s/ Stephen S. Chandler, Jr.
United States District Judge
District of Oklahoma

[fol. 21] IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

(File Endorsement Omitted)

No. 34315

UNITED STATES OF AMERICA

v.

ERNEST DOSSY YANCY

JUDGMENT—September 2, 1954

On this 2nd day of September, A.D., 1954 came the attorney for the government and the defendant appeared in person and[1] with his counsel, William T. Patrick,

IT IS ADJUDGED that the defendant has been convicted upon his plea of[2] Not Guilty and Verdict of Guilty of the offense of violating Section 2553(a), Title 26, U.S.C. (Unlawful purchase and sale of narcotics) as charged[3] in the Counts 3 and 4 of the Information, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized

[1] Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel."

[2] Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be.

[3] Insert "in count(s) number " if required.

representative for imprisonment for a period of [4] five years (5 years) as to Count 3 and five (5) years as to Count 4, the sentence of Count 4 to run consecutively to Count 3, making a total of ten (10) years.

IT IS FURTHER ORDERED that the Defendant pay to the United States of America a fine of One Dollar ($1.00) on Count 3 and One Dollar ($1.00) on Count 4.

IT IS FURTHER ORDERED that Counts 1 and 2 of the Information be and they are hereby dismissed on Motion of the Assistant United States Attorney.

IT IS ADJUDGED that [5] bond be and it hereby is cancelled.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshall or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Stephen S. Chandler, Jr.,
United States District Judge.

The Court recommends commitment to: [6]

.....,
Clerk.

[fols. 22-24] . . .

---

[4] Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding or unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law.

[5] Enter any order with respect to suspension and probation.

[6] For use of Court wishing to recommend a particular institution.

[fol. 22a] RETURN

I have executed the within Judgment and Commitment as follows:

Defendant delivered on September 2nd, 1954 to Wayne County Jail Detroit, Mich.

Defendant noted appeal on

Defendant released on

Defendant elected, on not to commence service of the sentence.

Defendant's appeal determined on

Defendant delivered on September 8, 1954 to Federal Correctional Institution at Milan, Michigan (pending transfer to, the institution designated by the Attorney General, with a certified copy of the within Judgment and Commitment.

WILLIAM A. NOWICKI
United States Marshal.

By Kenneth W. Lewis
Deputy.

[fol. 25] IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DISTRICT

(Title Omitted).

PETITION TO VACATE ILLEGAL SENTENCE—
Filed November 26, 1956

The petition of Ernest Dossy Yancy, defendant aforestated, as petitioner, brought under authority of 28 U.S.C.A. 2255, alleges as follows:

1.

That petitioner is in the custody of the Attorney General of the United States, now confined at the United States Penitentiary, Atlanta, Georgia.

2.

That an information was filed by the United States Attorney, Eastern District of Michigan, alleging violations of the Narcotic Law, four (4) counts, counts 1 and 2 being subsequently dismissed. That count 3 of information No. 34315 charged a violation of 26 U.S.C.A. 2553(a), more specifically the purchase of heroin in unstamped package, and count 4 of same information charge a violation of 26 U.S.C.A. 2553(a), more specifically the sale of heroin in unstamped package.

[fol. 26]

3.

That on May 18, 1954, petitioner appeared before this Honorable Court, with attorney present, and waived indictment. Counsel appeared to stand mute and petitioner was ignorant of the law and his right to a grand jury presentment. A plea of not guilty was entered to the information filed. On August 4, 1954, petitioner asked permission of the court to change counsel and this was done.

4.

That on August 31, 1954 petitioner was found guilty on count 3 and count 4 of information No. 34315.

5.

That on September 2, 1954 petitioner was sentenced in this court to a term of five (5) years on count 3, and a term of five (5) years on count 4, the sentence imposed on count 4 to be served consecutively to that imposed on count 3, an aggregate total of ten (10) years.

6.

That the sentences imposed on count 3 and count 4, to be served consecutive one to the other are illegal as such, being therefore one sentence or the other double punishment. That the maximum provided by law for violation of 26 U.S.C.A. 2553(a) being five (5) years, sentences imposed on counts 3 and 4 of five (5) years each must be served concurrent with each other to avoid double punishment.

7.

That the court erred in imposing sentence on count 4 of five (5) years consecutive to sentence imposed on count 3 of five (5) years, being in violation of the Fifth Amendment in that the same essential elements and proof thereto existed in each count under the same title and section and at the same time, as will appear herein:

[fol. 27]

FACTS

Count 3 of information No. 34315 alleged that, on May 17, 1954, petitioner purchased 775 grains of heroin in an unstamped package, the vendor not being named. Count 4 of information No. 34315 alleged, that on May 17, 1954, petitioner sold 775 grains of heroin in an unstamped package, the buyer not being named.

The elements in the two counts are identical: (a) The time or date of each alleged transaction, (b) The quantity of 775 grains, (c) That it was heroin, and (d) That it was an unstamped package. The statute concerned, 26 U.S.C. 2553(a), is inclusive as to violation, i.e., to buy, sell, or conceal, any or each, as to narcotics imported without payment of tax, etc.

Whether the alleged violation was either to buy, or to sell, each of the elements noted as (a), (b), (c) and (d)

above are essential as proof to either violation. The act of buying, or selling, is of itself nothing excepting the essential elements exist, are so named and so proven. Therefore, a conviction on count 3 is a defense against a conviction on count 4 of the same identical title and section, the essential elements and proof of one being also the same for the other.

Where double jeopardy is apparent by conviction on count (4) following conviction on count 3, imposition of consecutive sentence on count 4 is plainly that of double punishment. Had the respective sentences been imposed as concurrent with each other, the question and attack would lie moot.

ARGUMENT AND AUTHORITIES

In *Copperthwaite, Et Al* v. *U. S.*, #5415, C.C.A. 6, (37 F. 2d 846) where defendants were charged under Title 26 U.S.C. and under Title 21 U.S.C. for purchase and sale separately, receiving consecutive sentences, the court ruled "Double Punishment," stating: "Identity as to [fol. 28] double punishment as well as to double jeopardy, is shown if the same evidence necessary to prove either offense will also necessarily establish the other and this relation is reciprocal." (The question argued was: Can either be shown without disclosing the other?). In support the court cited *Reynolds* v. *U. S.* (C.C.A. 6, 280 F. 1, 2), and *Miller* v. *U. S.* (C.C.A 6, 300 F 2d, 529, 534) wherein the latter court (citing *Reynolds* v. *U. S.*, Supra) ruled that separate counts of possession and sale, within a short period of time, same material, was only one act, not two.

Citing as controlling authority the opinion expressed by Mr. Justice Jackson in *Krulewitch* v. *U. S.* (69 S. Ct. 716-725) the court set aside a consecutive sentence, where conspiracy and substantive counts contained the same elements, in *Freeman* v. *U. S.* (6 C.C., 146 F. 2d 978, 979, 1945), ruling: "Whenever it appears that the proof of one offense proves every essential element of another growing out of the same act, the Fifth Amendment limits the punishment to a single act."

Where one substantive is incidental to another charged, it cannot be charged as it is double punishment. *Schroeder* v. *U. S.*, (C.C.A. 2), 7 F. 2d 606.

In *Smithken* v. *U. S.* (265 Fed. 489), the court ruled: "If two indictments or two counts of one indictment are the same elements for elements in necessary allegations and proof, *then the charges are but one offense* and the defendant *cannot be tried for separate offenses*". (Emphasis by Petitioner).

See also: *Dimenza* v. *U. S.* (9 Cir.) 130 F. 2d 465; *Holbrook* v. *U. S.* (8 Cir.) 136 F. 2d 649; *Hewitt* v. *U. S.* (8 Cir.) 110 F. 2d 1; *Wells* v. *U. S.* (5 Cir.) 124 F. 2d 818; *Holiday* v. *U. S.* (8 Cir.) 130 F. 2d 988.

An early precedent was established, the analogy to petitioner's case made plain, by the court in *Re Neilsen* (131 U. S. 176, 9 S. Ct. 672, 33 L. Ed. 118) where, reversing, they ruled: ". . . . . crime which has various incidents in it, he cannot be tried a second time . . . . . [fol. 29] for one of those incidents." This decision was used as the controlling authority by courts reversing in *Reynolds* v. *U. S.*, supra; *Morgan* v. *U. S.* (C.C.A.) 294 F. 82; and *Rutkowski* v. *U. S.*, 149 F. 2d 481, all cases being analagous to your petitioner's.

If the same evidence will support a verdict of conviction on both offenses, a prosecution for one will bar prosecution for the other: *U. S.* v. *De Angelo*, 138 F. 2d 466; *U. S.* v. *Carlisi*, D. C. Ed. N.Y., 32 F. Supp. 479, 482; *Chiarella-Stancin* v. *U. S.* (2 C.C.), 187 F. 2d 12; *Ghadioli* v. *U. S.* (C.C.A.) 17 F. 2d 236; *Fitzpatrick* v. *U .S.*, 87 F. 2d 471, 472.

From another viewpoint, bearing in mind the severity of a sentence of ten (10) years, as petitioner received for two (2) counts charging separate offenses under a single statute and section, (the which provides a maximum of five (5) years only), alleged to have occurred on the *same date*, the *same ingredients and elements*, this court's attention is called to the case of *Amendola* v. *U. S.* (C.C.A. N.Y. 1927, 17 F. 2d 529). That case concerned itself with four counts stemming from a single sale of heroin, and consecutive sentences were imposed on the four counts to an aggregate of ten years. The court reversed and remanded, Justice Learned Hand

ruling: "It is true that the defendant was an old offender. . . . . This did, indeed, make him subject to the maximum penalty; but it did not in our view justify swelling a single offense into two separate offenses by the mere contrivance of charging it in different ways." Other cases relating to severity of sentence, that is, due to consecutive sentences imposed on related or continuous crimes charged in separate counts, are: *Harrison* v. *U. S.* (C.C.A., 7 F. 2d 259); *Hartson* v. *U. S.* (C.C.A. 14 F. 2d 561); *Nash* v. *U. S.*, 54 F. 2d 1006-C.C.A. 2); and *Weems* v. *U. S.* (217 U. S. 349, 366, 367, 30 S. Ct. 544, 548, 54 L. Ed. 793) as cited in *Beckett* v. *U. S.*, (84 F. 2d 731).

Petitioner invites the court's attention to a most recent analogy, where decision, vacation and remand for new sentence following motion occurred in the lower [fol. 30] court, Southern District of New York. The case is *Rolon* v. *U. S.*, Cr. No. 133-8, order vacating and remand for new sentence by Judge Ryan was on April 26, 1956. Petitioner in this case was sentenced on count 1 charging possession, count 2 charging sale, and count 3 charging conspiracy with others. The three sentences were consecutive. Judge Ryan vacated sentence on counts 1 and 2, ruling: ". . . . There was no possession save that incident to sale. Cumulative sentences under counts 1 and 2 were therefore improperly imposed" and cited *U. S.* v. *Chiarella*, 187 F. 2d 12 (C.A. 2, 1951), *Amendola* v. *U. S.*, supra, and *Schroeder* v. *U. S.*, supra.

In drawing an analogy between the above case and your petitioner's, the first being "possession" and "sale," the latter being "purchase" and "sale," but in both instances *the same material* (heroin) was the prime element. Examination of the trial transcript will show that "purchase" was based on presumption to convict since heroin is not produced in this country, nor could petitioner ever obtain same other than by purchase. Therefore, "purchase" is synonymous with "possession," and that which petitioner was charged with *purchasing* on May 17, 1954 (775 grains of heroin in an unstamped package), was same, and all same (775 grains of heroin in an unstamped package), which petitioner was charged with *selling* on May 17, 1954.

Judge Gourley, Chief Judge of Western District of Pennsylvania, reduced sentence, following petition under 28 U.S.C. 2255, in case of *Prince* v. *U. S.*, Cr. No's. 14041, 14051, and 14056, on July 1, 1954, where a parallel may well be noted between that case and instant petition. Prince was charged under 26 U.S.C. 2553, and 2554, and 21 U.S.C. 173-174, in four counts of sales made on August 8, August 22, August 31, and September 5, 1953. On the four counts, prince was imposed consecutive sentences aggregating eleven (11) years. Judge Gourley reduced these sentences to an aggregate of five (5) years, stating primarily the reason was because the period covered represented a continuous course of conduct (sales) of *not more than 30 days.*

[fol. 31] Your petitioner's alleged course of conduct (i.e., purchase, and sale, of the *same identical material*, no more nor less) was at one point in time, on May 17, 1954.

Judge Gourley (in *Prince* v. *U. S.*, supra) expressed himself further: "Since the defendant . . . . . was a first offender under the Federal law, I am compelled to conclude that the sentence imposed is excessive and unreasonably burdensome. The Act (Public Law 255) under which sentence was imposed, as far as penal punishment is concerned, provides a sentence of not less than two nor more than five years for a first offender . . ."

Your petitioner is a first offender under the Federal law, yet he was imposed an aggregate sentence equaling that mandatory as maximum for a second offender under the law of that date. Your petitioner was imposed a sentence of five (5) years which was consecutive to a sentence of five (5) years on the first count from which the second count stemmed. The same date, the same identical elements necessary to prove one proved the other.

Your petitioner realizes that the last two cases cited above (*Rolon* v. *U. S.*, and *U. S.* v. *Prince*) are not binding as precedents on this Honorable Court, being themselves decisions made in the interest of Justice by the same trial court which imposed sentence. However, your petitioner believes this Honorable Court will give them due credence, analogous to the degree they may be, in hearing instant motion.

The court, in *Gargano* v. *U. S.* (C.C.A. Cal. 1944, 140 F. 2d 118) ruled: "District Court (had) jurisdiction to entertain motion . . . . . to set aside judgment on ground that it imposed two sentences for a single offense."

Petitioner prays this Honorable Court to entertain instant motion, set date for hearing, notify respondent and order production of petitioner to give testimony as may be necessary in support of allegations. (*U. S.* v. *Hayman*, Cal. 1952, 72 S. Crt. 263, 342 U. S. 205, 96 L. Ed.; *Clark* [vol. 32] v. *U. S.*, C.A. Ind. 1952, 194 F. 2d 528; *Cherrie* v. *U. S.*, C.A. Wyo., 1949, 179 F 2d 94; *Slack* v. *U. S.*, C.A. Tenn 1952, 196 F. 2d 493).

Petitioner further prays the court to vacate sentence of five (5) years on either of the two counts, the which one or the other constitute double punishment; or to correct such sentence as to impose the five (5) years on one count to be served *concurrent* with the five (5) years imposed on the other by issuance of a nunc pro tunc ordered. (See *Foster* v. *Zerbst*, 92 F. 2d 950).

Dated:

/s/ Ernest Dossy Yancy
Petitioner-Defendant

Subscribed and sworn to before me, a Notary Public, this 19 day of November, 1956.

/s/ John O. Boone
Notary Public
Parole Officer: Authorized by the Act of July 7, 1955 to Administer Oaths (18 U.S.C. 4004).

[fol. 33] IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

(File Endorsement Omitted)

No. 34315

(Title Omitted)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

&

ORDER OVERRULING MOTION TO CORRECT SENTENCE—
December 14, 1956

FINDINGS OF FACT

1. That Petitioner has filed a Motion to correct an illegal sentence and conviction under Section 2255, Title 28, USC, Rule 35 of the Federal Rules of Criminal Procedure, Section 3572 of Title 18, USC.

2. That a four-count Information was filed against the defendant on May 18, 1954.

3. That the defendant was arraigned before the court on May 18, 1954, at which time the United States attorney was granted authority to file the Information.

4. At the time of this arraignment, the defendant was represented by competent counsel, Herbert Harris, of Detroit, Michigan.

5. That the defendant in open court, in the presence of his counsel, was advised of his Constitutional rights and the charges which were preferred against him.

6. That the defendant and his counsel waived the filing of an Indictment and consented to the filing of the Information.

[fol. 34] 7. That defendant subsequently changed counsel and on *August 31, 1954*, proceeded to trial, at which time he was found guilty on Count 3, which charged the purchase of 775 grains of heroin which were not in the original stamped package, and on Count 4 which charged the sale of 775 grains of heroin on the same date to a special employee of the Narcotics Bureau.

8. On September 2, 1954, the defendant was sentenced to five years on Count 3 and five years on Count 4, said sentence on Count 4 to run consecutively with the sentence on Count 3, the aggregate total of said sentence being ten years. Counts 1 and 2 were dismissed on motion of the United States attorney.

CONCLUSIONS OF LAW

1. This Court has jurisdiction to entertain this Motion under Section 3572 of Title 18 and Section 2255, Title 28, of the United States Code, and Rule 35 of the Federal Rules of Criminal Procedure.

2. The defendant's claim that the Court erred in permitting the defendant to proceed to trial under an Information, in violation of his Constitutional rights, is without merit. *Rule 7 of the Federal Rules of Criminal Procedure*;

Gill v. *U.S.A.*
55 Fed. 2d 399 (1930)

Patton v. *U.S.A.*
281 U.S. 276—50 S. Crt. 253
74 L. Ed. 854, 70 ALR 263

Barkman v. *Sanford*
162 Fed. 2d 592
332 U.S. 816 (364)

McKenney v. *U.S.A.*
172 Fed. 2d 781

[fol. 35] 3. The defendant's claim that the Court erred in sentencing him to consecutive sentences on Counts 3 and 4, in violation of his Constitutional rights for the reason that the two counts constitute one continuous act, is without merit.

It is an established rule of law that where an offense, or offenses, occur which violate two or more sections of a statute the test to be applied in determining the question of identity of offenses charged is whether each requires proof of fact which is not required by the other.

Here proof of purchase was required to convict under Count 3; while proof of sale was required to warrant

conviction under the fourth count. When considering these elements, it is evident that the two counts did not charge offenses growing out of a single continuous transaction. The mere fact that the same quantity and same date is involved is of no consequence if each offense charged is separate unto itself.

"There is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit and punishing also the completed transaction."

It is further held that the Court has within its discretion the right to impose two or more sentences on separate counts in an Indictment or Information and have them run consecutively.

Blockburger v. *U.S.A.*
284 U.S. 299

Gavieres v. *U.S.A.*
220 U.S. 338

Albrecht et al v. *U.S.A.*
273 U.S. 1 (1927)

Burton v. *U.S.A.*
202 U.S. 344

[fol. 36] *Allston* v. *U.S.A.*
47 S. Crt. 634
274 U.S. 289
71 L. Ed. 1052

Mills v. *Aderhold, Warden*
110 Fed. 2d 765

Reger v. *Hudspeth*
103 Fed. 2d 825

It therefore follows that the Motion should be overruled.

/s/ Arthur F. Lederle
Chief Judge

Dated: December 14, 1956.

[fol. 37] IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 34315

(Title Omitted)

At a session of said Court held in the Federal Building, Detroit, Michigan, on December 14, 1956.

Present: Honorable Arthur F. Lederle
Chief Judge

Order Overruling Motion to Correct Sentence—
December 14, 1956

In accordance with the Findings of Fact and Conclusions of Law heretofore filed on this date,

It Is Hereby Ordered that defendant's motion to correct or set aside the sentence heretofore imposed in this cause shall be and it hereby is overruled.

/s/ Arthur F. Lederle
Chief Judge

[fol. 38] PROOF OF MAILING
(Omitted in Printing)

[fols. 39-43] • • •

[fol. 44] (File Endorsement Omitted)

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 34315

(Title Omitted)

MEMORANDUM AND ORDER VACATING FINDINGS OF FACT AND ORDER ENTERED DECEMBER 14, 1956, AND REENTERING SAID FINDINGS OF FACT AND ORDER AS OF THIS DATE—March 29, 1957

In this cause the Court entered an order on the 14th day of December, 1956, overruling a motion filed on November 26, 1956, to correct the sentence imposed on the defendant-petitioner by the Honorable STEPHEN S. CHANDLER sitting by special designation from the Western District of Oklahoma on September 2, 1954.

On the 25th day of February, 1957, it was brought to the attention of this Court by the defendant-petitioner, ERNEST DOSSY YANCY, that he had not received any notice from the Court that his motion had been decided upon and the time for appeal had subsequently run.

An examination of the Court's file reveals that copies of the order were sent to George E. Woods, Assistant United States Attorney, and William T. Patrick, counsel of record, at the time of trial of the defendant-petitioner. The defendant-petitioner does not appear on the Proof of Service.

The Court believing the statement of defendant-petitioner that he failed to receive notice of the entry of the order dated December 14, 1956, has been taken in good faith and provisions having been made in Rules 37(2)(a), 45(b)(2) and 49(c) of the Federal Rules of Criminal Procedure for this type of occurrence, and in accordance with the opinion of the United States Supreme Court in HILL v. HAWES, 320 U.S. 520, and REMINE v. U.S., 161 F. 2d 1020, and 331 U.S. 862,

[fol. 45] It Is Hereby Ordered that the Findings of Fact and Conclusions of Law, and order heretofore entered on December 14, 1956 be and they hereby are set aside and vacated.

It Is Further Ordered that the Findings of Fact and Conclusions of Law and Judgment identical to those Findings of Fact and Conclusions of Law and Order entered on December 14, 1957 are herewith being filed.

It Is Further Ordered that the defendant-petitioner is hereby denied leave to appeal in forma pauperis.

/s/ Arthur F. Lederle
Chief Judge

DATED: March 29, 1957

[fols. 46-49] • • •

[fol. 50] . . . .

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 34315

(Title Omitted)

At a session of said Court held in the Federal Building, Detroit, Michigan on March 29, 1957.

Present: Honorable Arthur F. Lederle
Chief Judge

Order Overruling Motion to Correct Sentence—March 29, 1957

In accordance with the Findings of Fact and Conclusions of Law heretofore filed on this date,

It Is Hereby Ordered that defendant's motion to correct or set aside the sentence heretofore imposed in this cause shall be and it hereby is overruled.

/s/ Arthur F. Lederle
Chief Judge

[fol. 51] PROOF OF MAILING
(Omitted in Printing)

[fols. 52-53] . . .

[fol. 54] (File Endorsement Omitted)

No. 13307

IN UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ERNEST DOSSY YANCY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the Eastern District of Michigan

---

OPINION—Decided February 28, 1958

Before SIMONS, Chief Judge, ALLEN and STEWART, Circuit Judges.

STEWART, Circuit Judge. The appellant was tried and convicted under two counts of an information charging violation of the narcotics laws. 26 U. S. C. A., § 4704; 26 U. S. C. A., § 7237. One count charged the appellant with the unlawful purchase of a quantity of heroin on May 17, 1954; the other charged the unlawful sale of the same heroin on the same date. Upon conviction the appellant was sentenced to a five-year prison term on each count, the sentences to run consecutively.

More than two years later the appellant filed in the sentencing court a motion to vacate or correct sentence under the provisions of 28 U. S. C. A., § 2255. The grounds for the motion were two: that the appellant had not been protected in his Constitutional right of being proceeded against by indictment rather than information, and that the consecutive five-year sentences, amounting to double punishment for the same offense, violated the appellant's Fifth Amendment rights. This appeal is

from the district court's denial of the motion, upon findings of fact and conclusions of law.

We deal at the outset with the appellant's contention that the district court should have conducted a hearing on the motion. While one of the grounds for the motion raised a factual issue, it was an issue that was readily determinable by reference to the files and records in the [fol. 55] district court, particularly the transcript of the arraignment. The appellant's other claim presented a question of law alone. No hearing was necessary under these circumstances. *United States* v. *Hayman*, 342 U. S. 205 (1952); cf. *Zavada* v. *United States*, —— U. S. —— (January 20, 1958).

Upon the first branch of the motion the district court's order was correct. The record affirmatively shows that the appellant was represented at the arraignment by counsel of his own choosing, who advised the district judge in open court that indictment had been waived. Rule 7(b), F. R. Crim. P. The original written waiver, signed by the appellant while represented by counsel, is part of the record on this appeal.

Upon the second branch of the motion it was the appellant's claim that the evidence at his trial showed only that he had sold the narcotics in question to a government agent, and that his conviction on the purchasing count was based solely on his possession of the same narcotics which he was convicted of selling. His contention was that under these circumstances two separate consecutive five-year sentences violated his Constitutional right and also exceeded the then statutory five year maximum sentence for first offenders under the Boggs Act, 26 U. S. C. A., § 7237 (1955 ed.). He therefore asked that one of the five-year sentences be set aside.

In denying this branch of the motion the district court did no more than follow an unbroken line of judicial authority. *Blockburger* v. *United States*, 254 U. S. 299 (1932); *Long* v. *United States*, 235 F. (2d) 183 (6 Cir., 1956); *McDade* v. *United States*, 206 F. (2d) 494 (6 Cir., 1953); *Gore* v. *United States*, 244 F. (2d) 763 (D. C. Cir., 1957); *Harris* v. *United States*, 248 F. (2d) 196, 200 (8 Cir., 1957); *United States* v. *Brisbane*, 239 F. (2d) 859 (3 Cir., 1956); *United States* v. *Johnson*, 235 F. (2d) 159

(7 Cir., 1956); *United States* v. *Lewis*, 227 F. (2d) 524 (2 Cir., 1955).

Under the weight of these and many similar precedents, there is no choice but to affirm the district court's order. In doing so, however, we note Judge Bazelon's concurring opinion in *Gore* v. *United States*, *supra*, 244 F. (2d), at 766: "If we were approaching afresh the question whether, in such a case, single or cumulative punishment is the legal course, I think we could not so easily conclude that the consecutive sentences here imposed are authorized. 'It would be self-deceptive to claim that only one answer is possible to our problem.' . . . But the question is not one we are at liberty to approach afresh."

[fol. 56] As there suggested, it may be that the "same evidence" test, applicable to narcotics offenses under the rule of the *Blockburger* case, will someday be re-examined by the Supreme Court in the light of its decisions applying the "same transaction" test to other criminal statutes. *Bell* v. *United States*, 349 U. S. 81 (1955); *Prince* v. *United States*, 352 U. S. 322 (1957); *United States* v. *Universal Corp.*, 344 U. S. 218 (1952). But that day has not yet come.

The order of the district court is affirmed.

[fol. 57] . . . .

IN UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 13,307

ERNEST DOSSY YANCY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Before SIMONS, Chief Judge, ALLEN and STEWART, Circuit Judges.

JUDGMENT—February 28, 1958

APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Michigan, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

/s/ Potter Stewart
United States Circuit Judge

(File Endorsement Omitted)

[fol. 58] MANDATE—March 26, 1958

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Honorable, the Judges of the United States District Court for the Eastern District of Michigan—GREETING:

WHEREAS, lately in the United States District Court for the Eastern District of Michigan, before you or some of you, in a cause between United States of America, Plaintiff, and Ernest Dossy Yancy, Defendant, (D. C. No. 34315 Criminal), an order was entered on the 14th day of December, 1956, overruling defendant's motion to correct sentence;

AND WHEREAS, the said Ernest Dossy Yancy appealed to this court as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Court of Appeals for the Sixth Circuit by virtue of an appeal agreeably to the Act of Congress, in such cases made and provided, fully and at large appears.

AND WHEREAS, in the present term of October, in the year of our Lord, one thousand nine hundred and fifty-seven, the said cause came on to be heard before the said United States Court of Appeals for the Sixth Circuit, on the said transcript of record, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the said District Court in this cause be and the same is hereby affirmed.

[fol. 59] YOU, THEREFORE, ARE HEREBY COMMANDED that such proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

WITNESS the Honorable EARL WARREN, Chief Justice of the United States, the twenty-sixth day of March in the year of our Lord one thousand nine hundred and fifty-eight.

/s/ Carl W. Reuss
Clerk,
United States Court of Appeals
For The Sixth Circuit

[fol. 60] SUPREME COURT OF THE UNITED STATES

No. ——, October Term, 1957

ERNEST DOSSY YANCY, PETITIONER

v.

UNITED STATES OF AMERICA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—May 26, 1958

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 27, 1958.

/s/ Harold H. Burton
Associate Justice of the
Supreme Court of the
United States.

Dated this 26th day of May, 1958.

[fol. 61] SUPREME COURT OF THE UNITED STATES

No. 64 Misc., October Term, 1958

ERNEST DOSSY YANCY, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—March 23, 1959

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 792.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

March 23, 1959

MR. JUSTICE STEWART took no part in the consideration or decision of these applications.

☆ U. S. GOVERNMENT PRINTING OFFICE 1959 512384 - 1696

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 47

ERNEST DOSSY YANCY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

SEYMOUR B. GOLDSMAN
Attorney for Petitioner
1503 Ford Building
Detroit 26, Michigan

INDEX

CITATIONS:

Cases:

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 47

ERNEST DOSSY YANCY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

Opinions Below

The Order of the District Court and the supporting findings of fact and conclusions of law, entered on March 29, 1957 (R. 5, 18-20), are unreported. The opinion of the Court of Appeals (R. 21) is reported at 252 F. 2d 554.

Jurisdiction

The judgment of the Court of Appeals was entered on February 28, 1958; on May 26, 1958, Mr. Justice Burton entered an Order extending the time for filing a Petition for Writ of Certiorari. The Petition was filed on June 25, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Question Presented

Whether consecutive sentences could properly be imposed on two counts charging, respectively, the purchase and the sale of the same quantity of narcotics on the same day, both in violation of the stamped package requirement of the Internal Revenue Code, by a first offender.

Constitutional Provisions and Statutes Involved

Section 2553(a) of the Internal Revenue Code of 1939, as amended (26 U.S.C., Supp. I, 2553(a), now Section 4704(a) of the Internal Revenue Code of 1954, 26 U.S.C., Supp. V):

> It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; • • •

Chapter 666, Public Law 255, 82d Congress:

> An Act to amend the penalty provisions applicable to persons convicted of violating certain narcotic laws, and for other purposes.
>
> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled; That:
>
> Section 2(c) of the Narcotic Drugs Import and Export Act, as amended (U.S.C. Title 21 Sec. 174) is amended to read as follows:

"(c) Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000.00 and imprisoned not less than two years or more than five years. . . ."

"Whenever on trial for a violation of this subdivision the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Section 2. Section 2557(b)(1) of the Internal Revenue Code is amended to read as follows:

"(1) Whoever commits an offense or conspires to commit an offense described in this subchapter, subchapter 'c' of this chapter or parts V or VI of subchapter A of Chapter 27, for which no specific penalty is otherwise provided, shall be fined not more than $2,000.00 and imprisoned not less than two or more than five years. . . ."

Approved November 2, 1951.

U.S.C.A. Title 28 Sec. 2255:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdic-

tion to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of constitutional rights of the prisoner as to render the judgment subject to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the Court of Appeals from the order entered on the motion as from a final judgment on application for a writ of *habeas corpus*.

U. S. Const., Amend. V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or

indictment of a Grand Jury; except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U. S. Const., Amend. VIII:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Statement

The Appellant was tried and convicted under two counts of an information, dated May 17, 1954, charging violation of the narcotics law, Sec. 2553(a), Title 26, U.S.C. One count charged the Appellant with the unlawful purchase of a quantity of heroin on May 17, 1954, and the other charged the unlawful sale of the same heroin on the same day (R. 1-2). Upon conviction on August 31, 1954, the Appellant was sentenced September 2, 1954, to a five-year prison term on each count, the sentences to run consecutively (R. 5).

The Appellant, on November 26, 1956, filed a Petition to Vacate an Illegal Sentence, under 28 U.S.C. 2255, contending that his constitutional rights were violated by being proceeded against by indictment, rather than information, and by a sentence to a five-year prison term on each count, the sentences to run consecutively. The Appellant contended that the consecutive sentences amounted to double punishment (R. 7-13).

On December 14, 1956, the District Court overruled the Appellant's Motion to Vacate, without conducting a hearing on the motion (R. 17). On March 29, 1957, the District Court entered a Memorandum and Order Vacating Findings of Facts and Order Entered December 14, 1956, and re-entering said Findings of Facts and Order as of the said date of March 29, 1957 (R. 18-20). An appeal to the United States Court of Appeals for the Sixth Circuit was taken *in forma pauperis, in pro se;* from the District Court's denial of the motion, upon findings of fact and conclusions of law.

On February 28, 1958, the judgment of the United States Court of Appeals for the Sixth Circuit was entered, affirming the Order of the District Court (R. 21-23). The Court of Appeals followed the line of judicial authority expressed in *Blockburger* v. *United States,* 284 U.S. 299 (1932), and left to this Court the question of whether this line of authority should be re-examined (R. 23).

Summary of Argument

The imposition of consecutive sentences on two counts charging, respectively, the purchase and sale of the same quantity of narcotics on the same day, both in violation of the stamped package requirements of the Internal Revenue Code, is in conflict with the line of decisions applying "the same transaction test." Such sentencing of a first offender of the narcotics code is in conflict with the intent of Congress in the administration of Federal criminal laws as expressed by the amendments to the statutes controlling the sale of narcotics and providing a scale of punishments for second and third offenders. Such sentences imposed on the same facts constitute double punishment, in violation of the Double Jeopardy Clause of the United States Constitution, Amendment V.

ARGUMENT

I. The Decision of the Court Below Is in Direct Conflict With the Line of Decisions Wherein the Supreme Court of the United States Has Applied the "Same Transaction Test."

The Court below relied upon cases which follow the principles laid down in *Blockburger* v. *United States*, 284 U.S. 299 (1932). The court's decision, however, is inconsistent with the principles of the *Blockburger* case because it allowed separate offenses to be proved and separate punishments to be imposed upon the proof of a single fact. In the instant case, the single fact of possession of unstamped narcotics was the source of the presumption of unlawfulness in both the purchase and sale. The Petitioner contends that the only evidence introduced at the trial was the sale alleged in Count Four, and that his conviction on Count Three, alleging a purchase, was based on the statutory presumption arising from the fact of his possession at the time of sale. The information in the instant case charged the purchase and sale occurred on the same day.

Unlike the instant case, where the court applied a presumption of unlawful purchase, in the *Blockburger* case the Petitioner was convicted of two sales to the same person on separate dates, and the later sale having been made not in pursuance of a written order of purchase, as required by statute. In the *Blockburger* case, each provision required proof of a fact which the other did not. In determining whether there were separate statutory offenses the court, in the *Blockburger* case, at page 304, said:

> "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether

there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."

The District Court, in the Order Overruling the Appellant's Motion to Correct Illegal Sentence, disregarded this rule of the *Blockburger* case in its findings of fact, although it cited the *Blockburger* case as authority for finding two separate offenses. On page 3 of its Order, the District Court stated (R. 15-16):

> "Here proof of purchase was required to convict under Count 3; while proof of sale was required to warrant conviction under the fourth count. When considering these elements, it is evident that the two counts did not charge offenses growing out of a single continuous transaction. The mere fact that the same quantity and same date is involved is of no consequence if each offense charged is separate unto itself."

This reasoning clearly failed to apply the test of the *Blockburger* case, that punishment under separate sections can be sustained only if "each provision requires proof of a fact which the other does not." 284 U.S., at page 304.

The instant case is distinguished factually from the case of *Gore* v. *United States*, 357 U.S. 386, decided while this Petition was pending, in that the Petitioner in the *Gore* case was convicted on counts of a sale on February 26, 1955, another sale on February 28, 1955, and successive counts charging unlawful sales of drugs except in the original stamped package and fraudulent importation of drugs. The opinion of this court in the *Gore* case does not disclose whether there was evidence presented in the trial court to support a conviction for each separate offense charged, and it appears that the Petitioner in the *Gore* case argued that the decision in the *Blockburger* case had to be overruled.

In regard to the Count alleging purchase of the same quantity of the narcotics on the same day as the sale, as a violation of 26 U.S.C.A. 2553(a), the Court reversed in *Donaldson* v. *United States*, 23 F. 2d 178, 8th Cir., with an opinion well in point with Appellant's argument:

> "There was no direct evidence of purchase by Defendant. The prosecution relied upon the statutory presumption attached to possession by the section, to sustain the charge of purchase of the unstamped package; there was no evidence tending to show that the alleged purchase was made within the Court's jurisdiction or where it was made. Where we held in *Brightman* v. *United States*, 7 F. 2d 532, on this identical proposition, that the statutory presumption did not include the subject of venue, there must be some proof that the crime charged was committed within the jurisdiction of the Court, and without that proof the Court could not assume it had jurisdiction over the subject matter. . . .
>
> "It was necessary to lay the venue in the indictment; that was done—and to prove it by direct or circumstantial evidence; that was not done. Hence there was no proof from which it could be said the Court had jurisdiction of the crime charged and power to punish the Defendant therefor."

II. The Decision of the Court Below Is in Conflict With the Intent of Congress in the Administration of Federal Criminal Laws.

In Public Law 255, 82d Congress, Chapter 666 (known as the Boggs Act), Congress expressly provided that a first offender of the Narcotics Code may receive a sentence of not more than five (5) years. The amendments to the statutes controlling the sale of narcotics in effect on the date of Petitioner's conviction provided a scale of punish-

ment for first, second and third offenders. This court recently reviewed the entire legislative history of the narcotics control statutes in *Gore* v. *United States*, 357 U.S. 386. Mr. Justice Frankfurter, at page 390, concluded for the court that there was a unitary Congressional purpose to outlaw nonmedicinal sales of narcotics. He concluded, however, that no desire should be attributed to Congress to punish only as for a single offense when multiple infractions are committed through a single sale. Mr. Chief Justice Warren, dissenting, said at page 394:

> "In this case I am persuaded, on the basis of the origins of the three statutes involved, the text and background of recent amendments to these statutes, the scale of punishments prescribed for second and third offenders, and the evident legislative purpose to achieve uniformity in sentences, that the present purpose of these statutes is to make sure that a prosecutor has three avenues by which to prosecute one who traffics in narcotics, and not to authorize three cumulative punishments for the defendant who consummates a single sale."

This court has stated in *Prince* v. *United States*, 352 U.S. 322 (1957), that where there is no intention expressed by Congress to pyramid the authorized penalties, there should be no attributing to Congress of an intention to punish more severely than the language of its laws clearly imports in the light of pertinent legislative history.

In support of this construction of the language of the statute, the Petitioner cites *United States* v. *Brown*, 333 U.S. 18 (1948), where it was held that the maxim that penal statutes are to be strictly construed is "satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers." This principle of construction of legislative language has been expressed in

the following cases: *United States* v. *Raynor*, 302 U.S. 540; *United States* v. *Giles*, 300 U.S. 41; *Gooch* v. *United States*, 297 U.S. 124; and *United States* v. *Corbett*, 215 U.S. 233.

This court, in *Bell* v. *United States*, 349 U.S. 81 (1955), indicated that any question as to the intent of Congress in regard to the degree of sentencing should be resolved in favor of lenity. This premise of prohibiting double punishment for a crime which contains various incidents has been propounded by this court, *in re Neilsen*, 131 U.S. 176; *Reynolds* v. *United States*, 280 Fed. 1; *Morgan* v. *United States*, 294 Fed. 82; and *Witkowski* v. *United States*, 149 F. 2d 481. Since Congress has provided a maximum of a five-year sentence for a first offender, under the Boggs Act, the sentencing for cumulative punishments is in direct contradiction to the manifest intent of the legislature.

III. Consecutive Sentences Imposed on Conviction of Two Counts Charging, Respectively, the Purchase and Sale of the Same Quantity of Narcotics on the Same Day, Both in Violation of the Stamped Package Requirement of the Internal Revenue Code, Constitute Double Punishment in Violation of the Double Jeopardy Clause of the U. S. Constitution, Amendment V.

Mr. Justice Douglas, dissenting, in *Gore* v. *United States*, 357 U.S. 386, set forth principles of law, the application of which to the instant case would hold that the imposition of consecutive sentences would constitute double punishment in violation of the Double Jeopardy Clause of the U. S. Constitution, Amendment V. Mr. Justice Douglas said, at page 395:

> "Plainly, Congress defined three distinct crimes, giving the prosecutor on these facts a choice. But I do not think the courts were warranted in punishing petitioner three times for the same transaction . . .

". . . Here the same sale is made to do service for three prosecutions . . . Yet I agree with Bishop: '* * * in principle, and by the better judicial view, while the legislature may pronounce as many combinations of things as it pleases criminal, resulting not infrequently in a plurality of crimes in one transaction or even in one act, for any one of which there may be a conviction without regard to the others, it is, in the language of Cockburn, C.J., "a fundamental rule of law that out of the same facts a series of charges shall not be preferred."' * 1 Criminal Law (9th ed. 1923) §1060. I think it is time that the Double Jeopardy Clause was liberally construed in light of its great historic purpose to protect the citizen from more than one trial for the same act.

"* Regina V. Elrington, 9 Cox C.C. 86, 90, 1 B. & S. 688."

The court, in *Ballerini* v. *Aderholt*, 5th Cir., 44 F. 2d 352, 353, held that the carving of several crimes out of one unlawful sale would put the defendant twice in jeopardy in violation of the U. S. Constitution, Amendment V, the court said, at pages 352 and 353, as follows:

"Under the Fifth Amendment one may not for the same offense be twice put in jeopardy. In determining what is the same offense the test usually applied is 'whether, if what is set out in the second indictment had been proved under the first, there could have been a conviction; when there could, the second cannot be maintained; when there could not, it can be.' 1 Bishop's Cr. Law (9th Ed.) §1052. In *Morey* v. *Commonwealth*, 108 Mass. 433, a leading case often cited by the Supreme Court, it is said: 'The test is not whether the defendant has already been tried for the same act,

but whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.' See *Tritico* v. *United States* (C.C.A.), 4 F. (2d) 664, where several Supreme Court cases on this subject are collected. To those cases should be added the more recent case of *Albrecht* v. *United States*, 273 U.S. 1, 47 S. Ct. 250, 71 L. Ed. 505. *Ex parte Nielsen*, 131 U.S. 176, 9 S. Ct. 672, 676, 33 L. Ed. 118, which also cites with approval the *Morey Case;* it is said: 'Where, as in this case, a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense.'

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed and remanded, with instructions to grant Petitioner's Motion and to vacate the cumulative sentences imposed upon him.

Dated: August 19, 1959.

SEYMOUR B. GOODMAN
Counsel for Petitioner
1503 Ford Building
Detroit 26, Michigan

No. 47

In the Supreme Court of the United States

October Term, 1959

ERNEST DOSSY YANCY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,

MALCOLM R. WILKEY,
Assistant Attorney General,

ROBERT S. ERDAHL,
J. F. BISHOP,
Attorneys,
Department of Justice,
Washington 25, D. C.

INDEX

CITATIONS

Cases:

Cases—Continued

Statutes:

In the Supreme Court of the United States

October Term, 1959

No. 47

ERNEST DOSSY YANCY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The order of the District Court and the supporting findings of fact and conclusions of law, entered on March 29, 1957 (R. 18), are not reported. The opinion of the Court of Appeals (R. 21-23) is reported at 252 F. 2d 554.

JURISDICTION

The judgment of the Court of Appeals was entered on February 28, 1958 (R. 24). On May 26, 1958, Mr. Justice Burton entered an order extending the

time for filing a petition for a writ of certiorari to and including June 27, 1958 (R. 26). The petition was filed on June 25, 1958, and was granted on March 23, 1959 (R. 27). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether consecutive sentences could properly be imposed on two counts charging, respectively, a purchase and a sale of the same quantity of narcotics on the same day, both in violation of the stamped package requirement of the Internal Revenue Code.

STATUTE INVOLVED

Section 2553(a) of the Internal Revenue Code of 1939, as amended (26 U.S.C., (1952 ed., Supp. I), 2553(a)):

> It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; * * *.[1]

STATEMENT

Petitioner was tried and convicted in the District Court for the Eastern District of Michigan on two counts of an information charging violations of Sec-

[1] Now Section 4704(a) of the Internal Revenue Code of 1954, 26 U.S.C.

tion 2553(a) of the Internal Revenue Code of 1939, *supra*, p. 2. One count charged him with the purchase of a specified quantity of heroin on May 17, 1954, "not in or from the original stamped package," and the other charged him with selling, dispensing and distributing the same quantity on the same date to a special employee of the United States Bureau of Narcotics, likewise "not in or from the original stamped package."[2] He was sentenced on September 2, 1954, to five years' imprisonment on each count, the sentences to run consecutively (R. 5-6).

In November 1956, petitioner filed a motion under 28 U.S.C. 2255 to vacate or correct his sentence, con-

---

[2] The full text of the counts is as follows (R. 1-2):

"Count Three:

"The United States Attorney further charges that on or about May 17, 1954, in the Eastern District of Michigan, Southern Division, Ernest Dossy Yancy unlawfully and knowingly purchased a quantity or narcotics, to-wit: approximately seven hundred seventy-five (775) grains of heroin, not in or from the original stamped package and not having on it the appropriate tax-paid United States Internal Revenue stamps, as required by law; in violation of Section 2553(a), Title 26, U.S.C.

"Count Four:

"The United States Attorney further charges that on or about May 17, 1954, in the Eastern District of Michigan, Southern Division, Ernest Dossy Yancy did unlawfully and knowingly sell, dispense and distribute to a special employee of the U. S. Bureau of Narcotics approximately seven-hundred seventy-five (775) grains of heroin, which said heroin was sold, dispensed and distributed not in or from the original stamped package and not having on it the appropriate tax-paid United States Internal Revenue stamps, as required by law; in violation of Section 2553(a), Title 26 U.S.C."

tending, *inter alia*, that the consecutive sentences amounted to double punishment in that the evidence at his trial showed only that he sold the heroin and the conviction for purchasing was based only on his possession of the narcotics (R. 7-13). The trial court concluded that each offense required proof of a fact not demanded by the other and that "the two counts did not charge offenses growing out of a single continuous transaction," citing (among other cases) *Blockburger* v. *United States*, 284 U.S. 299, and *Albrecht* v. *United States*, 273 U.S. 1 (R. 16). The Court of Appeals affirmed, relying upon the *Blockburger* rule and leaving to this Court the question whether the *Blockburger* line of authority should be re-examined (R. 22-23).[3]

SUMMARY OF ARGUMENT

I

The petition in this case, filed prior to the decision in *Gore* v. *United States*, 357 U.S. 386, attacked *Blockburger* v. *United States*, 284 U.S. 299, as inconsistent with later decisions such as *Bell* v. *United States*, 349 U.S. 81. *Gore* specifically reaffirmed *Blockburger* in upholding consecutive sentences for three offenses arising out of a single sale of narcotics. Petitioner's continued invocation of the principle of

[3] The further contentions, also rejected by the courts below, that the prosecution by information rather than indictment was invalid and that the District Court should have held a hearing on the motion under 28 U.S.C. 2255 are not renewed here (see Pet. 4).

lenity of *Bell* and *Prince* v. *United States*, 352 U.S. 322, on the basis of the Boggs Act of 1951 (which prescribed a maximum penalty of five years' imprisonment for first offenders against the narcotics laws) is unavailing, for the implications of the Boggs Act and other amendments increasing penalties and prescribing heavier penalties for second and third offenders were considered in *Gore* and the Court held that there is no room for judicial lenity in the area of narcotics offenses. This holding was reiterated in *Harris* v. *United States*, 359 U.S. 19, where the Court, on the authority of *Gore*, upheld consecutive sentences for purchasing unstamped narcotics and receiving and concealing the same drug with knowledge that it had been unlawfully imported, even though the prosecution proved only that the defendant had been in possession of the drug and relied upon the statutory presumptions arising from such possession to establish the elements of both offenses.

Petitioner's further contention that the consecutive sentences imposed upon him constituted double jeopardy was also specifically overruled in the *Gore* case.

II

The consecutive sentences involved in the *Gore* and *Harris* cases were based upon the single acts of sale and possession, respectively. The consecutive sentences imposed upon petitioner were based upon the separate transactions of a purchase and a sale of unstamped narcotics, each of which required its own separate impulse, enterprise and participants, and each of which is specifically prohibited by the statute

involved here. The separate transactions of purchase and sale are not converted into a single transaction merely because the purchase may have been made with resale in mind, for Congress may properly, as in this statute, punish each step in an offender's unlawful activities. It follows, therefore, that the Court's rejection of the contentions advanced in the *Gore* and *Harris* cases is even more strongly called for in this case.

III

Petitioner's contention that the decision below is inconsistent with *Blockburger* because it allowed separate offenses to be proved and separate punishments to be imposed upon proof of the single fact of *possession* of unstamped narcotics is wrong both in fact and in law.

1. Petitioner is in an even less favorable position on the facts than was the defendant in *Harris*, where only possession was proved and the statutory presumptions arising from that fact were invoked as to both counts. Here, the *sale* was proved by direct evidence; the presumption (which in the circumstances of a case such as this is rooted in the strongest of probabilities) was invoked only to support the charge of a prior purchase.

2. The *Harris* decision is dispositive of petitioner's contention as a matter of law. The Court made it clear in that case that the "ultimate facts of the violation" (359 U.S. at 23)—the elements of the offense as defined by Congress—are decisive in the application of the test of identity of offenses arising out of a single act or transaction. The nature or kind of

the particular proof which will suffice to establish a violation of a specific statutory prohibition, whether it be direct or prima facie, is not determinative. If the distinct offenses involved in *Harris* were not transformed into a single offense merely because the prosecution relied upon the statutory presumptions arising from possession to establish the ultimate facts of both violations, *a fortiori* the distinct offenses in this case of purchase and of sale were not merged when the prosecution proved petitioner's possession and sale by direct evidence and invoked the presumption only to establish that he had also previously purchased the narcotics.

ARGUMENT

I.

Petitioner's Contentions That the Principle of Lenity of *Bell* v. *United States*, 349 U.S. 81, Has Undermined the Authority of *Blockburger* v. *United States*, 284 U.S. 299, and That the Consecutive Sentences Imposed Upon Him Constituted Double Jeopardy Were Overruled By the Recent Decisions in *Gore* v. *United States*, 357 U.S. 386, and *Harris* v. *United States*, 359 U.S. 19.

1. The petition in this case was filed prior to the June 30, 1958, decision of this Court in *Gore* v. *United States*, 357 U.S. 386. The main thrust of petitioner's argument (Pet. 5-7) was the same as that subsequently rejected by the Court in that case, *i.e.*, that *Blockburger* v. *United States*, 284 U.S. 299, is in conflict with later decisions such as *Bell* v. *United States*, 349 U.S. 81, and should be overruled. *Gore*

specifically reaffirmed *Blockburger* in upholding consecutive sentences for three offenses arising out of a single sale of narcotics,[1] stating:

> * * * We brought the case here, 355 U.S. 903, in order to consider whether some of our more recent decisions, while not questioning *Blockburger* but moving in related areas, may not have impaired its authority.
>
> We adhere to the decision in *Blockburger* v. *United States*, *supra*. The considerations advanced in support of the vigorous attack against it have left its justification undisturbed, nor have our later decisions generated counter currents. [357 U.S. at 388].
>
> * * * *
>
> * * * The fact that an offender violates by a single transaction several regulatory controls devised by Congress as means for dealing with a social evil as deleterious as it is difficult to combat does not make the several different regulatory controls single and identic. * * * [357 U.S. at 389].

Although petitioner now attempts incorrectly to distinguish *Blockburger* and *Gore* from the instant

---

[1] "(1) Sale of the drug not pursuant to the requisite order form of the purchaser, in violation of Section 4705(a) of the Internal Revenue Code of 1954; (2) sale of the drug not in or from the original stamped package, in violation of Section 4704(a) (formerly Section 2553(a) of the Internal Revenue Code of 1939, the section involved in the instant case); and (3) concealment and sale of the drug with knowledge that it had been unlawfully imported, in violation of Section 2(c) of the Narcotic Drugs Import and Export Act, 21 U.S.C. 174 (357 U.S. at 387-388).

case,[5] he also continues to invoke the principle of lenity of *Bell* v. *United States*, *supra*, and *Prince* v. *United States*, 352 U.S. 322, and attempts to establish a basis for applying that doctrine in the provision of the Boggs Act of 1951 (65 Stat. 767; now incorporated in part in Section 7237(a) of the Internal Revenue Code of 1954) prescribing a maximum penalty of five years' imprisonment for first offenders against the narcotics laws (Br. 9-11). This contention presents nothing new. The implications of the Boggs Act and other amendments of the narcotics laws (which increased penalties and prescribed heavier penalties for second and third offenders) as reflecting a Congressional purpose to ameliorate the *Blockburger* doctrine, and the impact of the principle of lenity in the light of such legislation, were fully argued in the *Gore* case (No. 668, Oct. Term 1957, Pet. Br. 33-35, 45-49; Br. for U.S., 27-37, 44-45). The Court authoritatively held that there was no room for judicial lenity in the area of narcotics offenses (357 U.S. at 391-392):

> * * * We held [in *Bell*] that the transportation of more than one woman as a single transaction is to be dealt with as a single offense, for the reason that when Congress has not ex-

---

[5] Petitioner is mistaken in his suggestion (Br. 7, 8) that the sentences in controversy in *Blockburger* and *Gore* were based upon two sales on different dates. Although in each of those cases there were two such sales, which in themselves were separate offenses (*Blockburger*, 284 U.S. at 301-303), the cumulative sentences in question were imposed for the separate offenses arising out of a single act of sale (*id.*, at 301, 303-304; *Gore*, 357 U.S. at 387-388).

plicitly stated what the unit of offense is, the doubt will be judicially resolved in favor of lenity. It is one thing for a single transaction to include several units relating to proscribed conduct under a single provision of a statute. It is a wholly different thing to evolve a rule of lenity for three violations of three separate offenses created by Congress at three different times, all to the end of dealing more and more strictly with, and seeking to throttle more and more by different legal devices, the traffic in narcotics. Both in the unfolding of the substantive provisions of law and in the scale of punishments, Congress has manifested an attitude not of lenity, but of severity toward violation of the narcotics laws. Nor need we be detained by two other cases relied on, *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, and *Prince* v. *United States*, 352 U.S. 322. In the former we construed the record-keeping provisions of the Fair Labor Standards Act as punishing "a course of conduct." Of the *Prince* case, it suffices to say that the Court was dealing there "with a unique statute of limited purpose." 352 U.S., at 325.[6]

---

[6] Although the Court did not specifically recite the Boggs Act and other amendments discussed in the briefs, in its review of the statutes involved in that case, the allusion in the above quotation to "the scale of punishments" obviously had reference to such amendatory legislation. The fact that the Court considered the latter statutes is further emphasized by the references in the Chief Justice's dissent to "the origins of the three statutes involved, the text and background of recent amendments to these statutes, the scale of punishments prescribed for second and third offenders, and the evident legislative purpose to achieve uniformity in sentences" as supporting his view that "the present purpose

This holding was reiterated in *Harris* v. *United States*, 359 U.S. 19, decided March 2, 1959, which involved consecutive sentences for (1) purchasing narcotics not in or from the original stamped package and (2) receiving and concealing the same drug knowing it to have been unlawfully imported. Notwithstanding that the government proved only that the defendant had been in possession of the drug and relied upon the statutory presumptions arising from such possession to establish the elements of both offenses (359 U.S. at 20), the Court held that the case was controlled by *Gore*.

2. Similarly, petitioner's present contention that double jeopardy is involved in his sentences (Br. 11-13) was fully argued (Pet. Br. 53-76; Gov. Br. 38-47, 51-52) and expressly rejected in *Gore*, 357 U.S. at 392-393, over the dissent of Mr. Justice Douglas (Mr. Justice Black concurring), 357 U.S. at 395-397, upon which petitioner relies (Br. 11-12).

Petitioner presents no new considerations or arguments for deciding these questions differently, or for overruling these two recent decisions of the Court on these issues. In these circumstances, we do not believe it appropriate to retrace the ground already

---

of these statutes is to make sure that a prosecutor has three avenues by which to prosecute one who traffics in narcotics, and not to authorize three cumulative punishments for the defendant who consummates a single sale." 357 U.S. at 394. Petitioner quotes this paragraph of the Chief Justice's dissent in support of his contention that the consecutive sentences imposed upon him were violative of the intent of Congress (Br. 10).

covered in our briefs and in the opinions of the Court in the *Gore* and *Harris* cases.

II.

Petitioner's Offenses Did Not Stem From A Single Transaction Violating Several Statutory Provisions But Consisted of Two Separate Transactions—A Purchase and A Sale—Each of Which Is Prohibited By the Statute.

The rejection of the contentions advanced in *Gore* and *Harris*, *supra*, is dispositive of, and indeed more strongly called for in, petitioner's case, since the sentences involved here were not based upon one single act of sale or possession (as was true in those cases) but upon the two separate transactions of, first, a purchase and, second, a sale. The two transactions, each requiring its own separate impulse, enterprise, and participants, were, as appears on the face of the statute, considered separately and selectively by Congress; the statute involved here (and in *Gore* and *Harris*), relating to transactions not in or from the original stamped package, prohibits purchases as well as sales, while the companion provision (also involved in *Gore*, but not here) prohibiting transactions without order forms (26 U.S.C. 4705 (a)) covers sales, barters, exchanges or gifts, but not purchases. While the possibility of ambiguity as to whether several offenses or a single offense may be intended can arise where words are somewhat synonymous (cf. *Ladner* v. *United States*, 358 U.S. 169, 176-177), that is not possible where, as here, the prohibited acts are as diametrically opposite as purchase and sale.

The two separate acts of purchase and sale are not made a single transaction by the fact that the purchase may have been made with resale in mind, for Congress may properly, as in Section 2553(a) (now Section 4704(a) of the Internal Revenue Code of 1954), penalize each step in an offender's unlawful activities. E.g., *Albrecht* v. *United States*, 273 U.S. 1, 11-12 (possession of liquor and sale thereof); *Carter* v. *McClaughry*, 183 U.S. 365, 395 (conspiring to commit an offense and committing the offense); *United States* v. *Michener*, 331 U.S. 789 (causing a plate for counterfeiting to be made, and possession of that plate).[7] The fact that this section is designed to implement the narcotics tax laws and is not aimed at transactions in narcotics qua transactions (see *Blockburger* v. *United States*, 284 U.S. at 304), does not affect this conclusion. The specific inclusion of both purchases and sales within the coverage of the section plainly shows that Congress thought it important to prohibit all such transactions in unstamped narcotics, in aid of the enforcement of the stamp tax.[8]

---

[7] Significantly, the Court said in *Gore* (357 U.S. at 392) that an overruling of *Blockburger* would also involve overruling the *Albrecht*, *Carter*, and *Michener* cases, among others.

[8] In the course of the argument of the *Gore* case before this Court, in response to a question from the bench as to the limits of the number of offenses punishable under any one of the three sections involved in that case, government counsel replied generally that there would be only one offense under one section. This reply was, of course, meant to relate to the issue in that case as to the number of offenses involved in a single act of sale. Thus, for example,

III.

The Separate Offenses of Purchase and Sale Were Not Merged Into A Single Offense Merely Because, In Proving the Purchase, the Prosecution Was Aided By the Statutory Presumption Arising From the Proved Facts of Possession and Sale.

Paraphrasing Mr. Justice Brennan's dissent in the *Gore* case (357 U.S. at 397-398), petitioner contends that the decision below "is inconsistent with the principles of the *Blockburger* case" (Br. 7) "that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not" (284 U.S. at 304). Petitioner asserts that the courts below "allowed separate offenses to be proved and separate punishments to be imposed upon the proof of * * * the single fact of *possession* of unstamped narcotics"

---

a single sale not in or from the original stamped package would not be punishable separately as a sale, a dispensing, and a distribution, all of which are prohibited by Section 4704(a) of the Internal Revenue Code (formerly § 2553(a)). (Compare Count Four in this case, fn. 2, p. 3, *supra*, which charged as a single offense that petitioner "did * * * sell, dispense and distribute".) Counsel's remark was not intended to imply that separate and distinct acts, such as a purchase and a sale as in this case, each of which is clearly prohibited by the same section, are not separately punishable. The government's brief in *Gore* pointed out (p. 51) that, wholly aside from the question whether a single act of sale is punishable separately under the three statutes there involved, the evidence in the case indicated that Gore also purchased and transported the drug before he sold it and that these factually separate and distinct offenses supported the consecutive sentences imposed.

(emphasis added) and that this fact "was the source of the [statutory] presumption of unlawfulness in both the purchase and sale" (Br. 7-9; compare 357 U.S. at 397-398). His reliance upon *Blockburger* and the dissenting opinion of Mr. Justice Brennan in *Gore* is misplaced because, (1) as he states in the very next sentence of his brief, "the only evidence introduced at the trial was the *sale* alleged in Count Four" (emphasis added),[9] and (2) the opinion in the *Harris* case makes it clear that the statutory elements of the offenses, not the particular evidence which will suffice to establish such elements, are decisive in the application of the *Blockburger* test.

First. On the facts, petitioner is in an even less favorable position than that involved in *Harris*, where, upon direct evidence showing only possession of unstamped narcotics, the statutory presumptions were invoked as to both counts. Here, the offense of

---

[9] The United States Attorney advises us that the stenographic notes of the trial proceedings have not been transcribed. The investigative report confirms that this was a typical case of a sale of unstamped narcotics to an informer. In this connection, we should point out that the prosecutive technique used here of charging both a purchase and a sale in violation of the stamped package requirements is atypical, as demonstrated by the fact that we have been unable to find any reported case precisely in point. Typically, the method used in such a case is the one involved in *Gore*, *i.e.*, three counts charging violations of the Narcotic Drugs Import and Export Act and the order form and stamped package requirements of the Internal Revenue Code. The United States Attorney for the Eastern District of Michigan, where this case originated, advises us that the latter procedure is now used in his district.

sale of unstamped narcotics was proved by direct evidence; the presumption was invoked only to support the charge that petitioner earlier purchased the narcotics not in or from the stamped package. As applied in this case, the presumption of purchase arising from petitioner's possession of unstamped narcotics is rooted in the strongest of probabilities. Obviously, petitioner acquired in some way the narcotics which it was proved he sold to a special employee of the Bureau of Narcotics as alleged in Count Four. If he in fact acquired the drug by some means other than purchase, or in or from an original stamped package, it was open to him to adduce proof to that effect. See *Harris*, 359 U.S. at 23. It should not now be open to him to contend that his conviction on Count Three of purchasing the drug should be set aside because the government did not prove the purchase by direct evidence.[10] Indeed, although petitioner disclaimed in his petition (p. 7) any attack upon the sufficiency of the evidence to support his conviction on Count Three, his present claim amounts to just that.

Second. On the law, the *Harris* decision completely negates petitioner's contention. The Court there stated (359 U.S. at 23-24):

---

[10] *Donaldson* v. *United States*, 23 F. 2d 178 (C.A. 8), cited by petitioner (Br. 9) in support of this contention, is not in point. It was decided on the basis that the statutory presumption arising from possession did not extend to prove the *venue* of the alleged purchase, a holding in effect overruled by this Court in *Casey* v. *United States*, 276 U.S. 413, 417-418.

Petitioner insists that each offense here requires proof of only the single fact of possession, which brings it within the rule in *Blockburger, supra.* However, petitioner completely overlooks the fact that the "acts or transactions" prohibited by the respective statutes cannot be equated to possession alone. Let us analyze the offenses. Under the first count of the indictment, the prosecution must prove a purchase of narcotics, other than in or from the original stamped package. In order to establish these ultimate facts, the prosecutor may put on direct evidence of possession of the unstamped heroin and the statutory presumption of § 4704 (a) then has the effect of establishing, prima facie, that there was in fact a purchase and that the purchase was other than in or from the original stamped package. In this case, the heroin itself was introduced in evidence, thus the jury could determine whether or not it was stamped. Similarly, under the second count, the prosecution was obligated to prove three ultimate facts: (1) that the heroin was received and concealed; (2) that it had been imported contrary to law; and (3) that petitioner knew of the unlawful importation. After putting on direct evidence of the possession, the prosecution was aided by the statutory presumption of § 174 that the ultimate facts of the violation—entirely different, it must be noted, from those of the first count—were also present.

Thus, the *violation*, as distinguished from the direct evidence offered to prove that violation, was distinctly different under each of the respective statutes. Instead of limiting his proof to an alibi, petitioner could, by offering evidence

> tending to controvert one presumption or the other as to the ultimate facts, have earned an acquittal on either count and still have been found guilty on the other. * * *. It follows, even if the *Blockburger* test were applicable, that the offenses were separate and that consecutive sentences could be imposed on each count.

As we have shown (*supra*, pp. 12-13), Congress has dealt specifically with transactions in unstamped narcotics and has clearly defined the units of the offenses involved in such transactions as including both purchases and sales. Under the *Harris* decision, the "ultimate facts of the violation"—the elements of the offense as defined by Congress—are decisive in the application of the test of identity of offenses arising out of a single act or transaction. The nature or kind of the particular proof which will suffice to show a violation of a specific statutory prohibition, whether it be direct or prima facie, is not determinative.[11]

If, in *Harris*, the distinctly different offenses of purchasing unstamped narcotics and receiving and concealing the same drug knowing it to have been unlawfully imported were not transformed into a single offense merely because the prosecution proved only that the defendant had the unstamped narcotics in his possession and relied upon the statutory presumptions to establish the ultimate facts of both

---

[11] The case of *Ballerini* v. *Aderholt*, 44 F. 2d 352 (C.A. 5), upon which petitioner relies (Br. 12-13), confused the elements of an offense with the manner of proving it, and was specifically disapproved in *Blockburger*, 284 U.S. at 304.

violations, *a fortiori* the distinct offenses here involved of purchase and sale of unstamped narcotics were not merged when the prosecution, after proving the sale by direct evidence (unaided by the presumption), invoked the presumption arising from the fact of petitioner's possession only to establish that he also purchased the drug not in or from the original stamped package.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

MALCOLM R. WILKEY,
Assistant Attorney General.

ROBERT S. ERDAHL,
J. F. BISHOP,
Attorneys.

SEPTEMBER 1959.

U. S. GOVERNMENT PRINTING OFFICE 1959 534764 410